SUPREME COURT OF THE UNITED STATES.

October Term, 1919.

No. —.

IN RE. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, PETITIONER.

BRIEF FOR PETITIONER

Statement of the Case

The petitioner, which for brevity we shall call the Rock Island Company, a citizen of Illinois, with its principal office in Chicago, has been sued in the United States District Court at Toledo, for the recovery of money, by Toledo, St. Louis & Western Railroad Company, a citizen of Indiana, hereinafter called the Toledo Company. The court has not acquired jurisdiction of the person of the Rock Island Company, and cannot acquire such jurisdiction, since the company cannot be found within the district, nor is it suable therein by the Toledo Company for the recovery of money, not being an inhabitant of the district, and neither company being a resident thereof. Judicial Code, Sec. 51.

These objections to the assumption of jurisdiction by the District Court have been properly presented to

it (11, 12) but overruled (19, 22) and the Company has been ordered to defend or suffer judgment by default. It has no adequate remedy except to apply, as it does now, to this court for relief. "An appeal or writ of error, at the end of long and expensive proceedings, which must go for naught if the District Court is without jurisdiction, is not an adequate remedy." 213 U. S. at p. 467.

The District Court did not acquire jurisdiction of the person of the Rock Island Company upon the cause of action set up in the cross bill of the Toledo Company.

It is an action to recover money from the Rock Island Company, to wit., all sums that the Toledo Company may be required to pay to *bona fide* holders of its bonds, if there are any (which the pleading does not admit, but on the contrary denies), and all interest which it has paid on A & B bonds in excess of dividends received on the Alton stock (9, 10). There was a prayer that the Rock Island Company "may be held to be a party to this suit and required to answer hereto within the time required by law" (10), but no process was asked or issued. It was thought sufficient by the Toledo Company to allege that the Rock Island Company had "entered its appearance in this suit, and has become a party hereto, and has rendered itself subject to the jurisdiction of this court herein" (8, 9), as if that, if it were true, would overcome the objection that the Rock Island Company was not suable upon such a cause of action in a district whereof it was not an inhabitant.

The learned District Judge in the opinion filed by him (19) referred to the pleading as one which "demanded the bringing into this case as an *additional defendant,* of the Chicago, Rock Island & Pacific Railway Company". If that be true, issue and service of process was necessary. The pleading was not a cross-bill to any pleading of the Rock Island Company. That company never filed any pleading, and had not been named as a party in any pleading.

The Rock Island Company had neither occasion nor right to intervene, having by the protective agreement of August 3, 1914, assigned and vested in the Merrill Committee "complete and absolute title to the said bonds and coupons with the same effect as if the Committee were the absolute owners thereof" and "expressly empowered the Committee to sue on said bonds and coupons in their own names." This the Committee did in an answer and cross-bill filed by leave of the court August, 1915, being one of the pleadings which by the order of March 5, 1917, appointing a special master, were referred to him to take testimony upon the issues made up by the pleadings theretofore filed. His power was limited to the taking of testimony. He had none to permit pleadings to be amended, to admit new parties, or to entertain a petition for leave to intervene, if such a petition had been offered. These suggestions would seem to be a sufficient answer to the claim that Mr. Maxwell by his participation in the taking of testimony before the special master "entered the appearance" of the Rock Island Company. That he could not have done, since the Rock Island Company was not then a party to the suit. What he did was to appear as counsel for the Merrill Committee, who were

parties, in the interest of the Rock Island Company, and this was formally noted at the beginning of the taking of testimony on April 2, 1917, as follows:

> "The Central Trust Co. of New York, Joline, Larkin and Rathbone, Esqs. (by Henry B. Poor, Esq, of counsel). Edwin G. Merrill, et al., Bondholders' Committee by Spooner & Cotton, Esqs. (by T. M. Gordon, Esq. of counsel).
>
> Lawrence Maxwell, Esq., and J. P. Cotton, Esq. appearing for the Bondholders' Committee, Mr. Maxwell appearing to represent the interest of the Rock Island Company and Mr. Cotton representing the "A" bonds."

The only basis for the claim that the District Court has jurisdiction of the person of the Rock Island Company, is that Mr. Maxwell entered its appearance by appearing as counsel for the Bondholders' Committee.

But if we assume that the District Court could exercise so dangerous a power as to find that it had acquired jurisdiction of a person for whom no legal process had been asked, on whom none had been served, and against whom no relief had been prayed by any party to the suit, it would not follow that the court's jurisdiction extended to causes of action subsequently asserted for the first time.

In *Ex parte Indiana Transportation Company*, 244 U. S. 456, the Court held that "appearance in answer to a citation issued upon a libel *in personam* does not empower the court to introduce new claims of new claimants into the suit without service on the defendant and against his will." The case being in admiralty prohibition was the appropriate writ, and the Court granted it, on the ground that "the District

Court attempted to exceed its jurisdiction." Mr. Justice Holmes, delivering the opinion, quoted as follows from a New Jersey case cited in *Reynolds* v. *Stockton*, 140 U. S. 254, 256:

> "Persons by becoming suitors do not place themselves for all purposes under the control of the court."

In *Merriam* v. *Saalfield*, 241 U. S. 22, it appears, as shown by the head-notes, that the court held:

> "One not a defendant, but who is estopped by the decree because of having exercised control of the defense and who is not a resident of the district, cannot be brought into the action by the filing of a supplemental bill and mere notice to, and substituted service on, him without service of original process within the district.
>
> "Such a supplemental bill is not dependent on or ancillary to the original suit, in the sense that jurisdiction of it follows jurisdiction of the original cause."

In *Merriam* v. *Saalfield*, 241 U. S. 22, it is decided that a direct appeal to this court under section 238, Judicial Code, is not confined to cases in which the jurisdiction of the district court as a federal court is involved, but extends to cases involving its jurisdiction over the person. The jurisdiction of the District Court in the present case is denied on both grounds. The rule declared in *In re Massachusetts*, 197 U. S. 482, and *In re Glaser*, 198 U. S. 171, that this Court cannot grant prohibition or mandamus, in cases over which it has no original or appellate jurisdiction, does not therefore apply.

In *Ex parte Bradley*, 7 Wall. 364, 377, the Court allowed a writ of mandamus directed to the Supreme Court of the District of Columbia upon the ground "that the court below had no jurisdiction to disbar the relator for a contempt committed before another court. . . . No amount of judicial discretion of a court can supply a defect or want of jurisdiction in the case."

In *In re Metropolitan Trust Company*, 218 U. S. 312, a writ of mandamus was awarded as "the appropriate remedy," where the Circuit Court had vacated a decree "after the term had expired" and therefore without jurisdiction.

We respectfully pray that leave be granted to file the petition for a writ of prohibition or mandamus, and that a provisional rule be entered to show cause.

LAWRENCE MAXWELL,
WILLIAM L. DAY,
Counsel for Petitioner.